Supreme Court, U.S.
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No. _____

In The

Supreme Court of The United States

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NILDA SALDAÑA SANCHEZ, ET AL
Petitioner,

v

RAMON VEGA SOSA, ET ALS
Respondent,

_____♦_____

Petition For Writ of Certiorari
To The United States Court of Appeals
For the First Circuit

_____♦_____

PETITION FOR WRIT OF CERTIORARI

_____♦_____

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2718

QUESTION PRESENTED

Nilda Saldaña, et al, filed its notice of appeal from the United States District Court for the District of Puerto Rico after the court denied a post verdict motion requesting equitable relief as to back pay.

The lower Court held that back pay was subsumed by the Jury's compensensatory damage awards. The question presented to this Honorable Superiority is:

Should the back pay issue by decided by the court as an equitable relief or be awarded by the jury as part of compensatory damages when the issue of back pay was not placed to the jury?

NILDA SALDAÑA SANCHEZ; MIGUEL A. OCASIO SANTOS; MARGARITA POUPART FONTANEZ; HILDA TORRES PEÑA; MINERVA PACHOT RIVERA; JOSE L. ORTIZ ORTIZ; ZULMA RIVERA RIVERA; ANGEL L. RODRIGUEZ LAZU; LUZ M. ORTIZ QUINTANA, substituted by her heirs, IVAN CASTILLO ORTIZ; JOEL GONZALEZ; RAFAEL DELGADO MESTRE; JUAN NIEVES SANTIAGO; MIGUEL RAMOS CRUZ; SINFORIANO CASTILLO GARCIA, substituted by his heirs, EDUARDO CASTILLO ORTIZ, JOSE IVAN CASTILLO ORTIZ AND LOURDES CASTILLO; JULIO C. MOJICA AVILES, substituted by his heirs, SONIA MOJICA, ELVIRA MOJICA, SAHILY MOJICA, IRIS MOJICA, JULIO C. MOJICA, WILSON MOJICA, JESSICA MOJICA; ELVIRA PEREZ AND JOEL MENDEZ

Petitioners

V.

RAMON VEGA SOSA, RAUL FERRER, JULIO CESAR LOPEZ GERENA

Respondent

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1-2
STATUTES INVOLVED IN THIS CASE.	2
STATEMENT OF THE CASE.....	2-3
REASONS FOR GRANTING THE WRIT	3-5
I. The First Circuit Opinion directly conflicts with the Third, Sixth, Ninth, Tenth and Eleventh Circuits that held that Back Pay is an equitable remedy to be decided by the Court.	
CONCLUSION.....	5
APPENDIX	App.1

TABLE OF AUTHORITIES

	Page
Santiago-Negrón v. Castro Dávila, 865 F2d 431 (1st Cir 1989)	2
Hildebrand v. Board of Trustees of Michigan State University.....	3
Moore v Sun Oil Company of Pennsylvania, 636 F2d 154 (6th Cir. 1980).....	3
Sullivan v School of Board of Pinellas County 773 f2d 1982, 1187 (11th Cir 1985).....	3
Harkless v Sweency Independent School District 427 F2d. 319, 323, 324 (5th Cir. 1970).....	3
Williams v Owens Illinois, Inc., 665 F2d 918,929 (9th Cir.)	4
But of Skinner v. Total Pertoleum, Inc. , 859 F2d 1439 (10th Cir. 1988).....	4
Laskaris v. Thornburg,733 F2d. 260, 263 (3rd Cir.)	4

Letser v. Novack Investment Co.,
638 F2d 1137 (8th Cir.)..... 4

STATUTES AND RULES

Supreme Court Rule 13.1 2

28 U.S.C. § 1254 (1)..... 2

42 U.S.C. Sect. 1983..... 2

PETITION FOR WRIT OF CERTIORARI

Nilda Saldaña, et als, respectfully prays that a writ of Certiorary issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on April 15, 1999 in order to resolve the conflict between the Third, Sixth, Ninth, Tenth and Eleventh Circuit and First Circuit of Appeals on the important issue presented herein.

———♦———

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit that gives rise to this petition is included on Appendix A hereto ("App. A") at page A-1 to A-7.

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JURISDICTION

On July 20, 1998 United States District Court orally denied back pay to plaintiffs. On August 14, plaintiffs filed a Notice of Appeal to the Court of Appeals for the First Circuit which affirmed in an opinion filed on August 15, 1998.

Pursuant to Rule 13.1 this Petition has been filed within 90 days of the decision by Court of Appeals for the First Circuit.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

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STATUTES INVOLVED IN THIS CASE

42 U.S.C. Sect. 1983

———♦———

STATEMENT OF THE CASE

The District Court denied back pay as a remedy in equity belying on Santiago-Negrón v. Castro Dávila, 865 F2d 431 (1st Cir 1989) that takes the position that back pay shall be considered by the Jury as one of the items of compensatory damages.

The First Circuit affirmed holding that at Santiago-Negrón controlled and cited Santiago-Negrón:

> "In a § 1983 case based upon an alleged unconstitutional political

firing where the issues of liability and compensatory damages will be determined by a jury, back pay shall be considered by the jury as one of the items of compensatory damages."

———♦———

REASONS FOR GRANTING THE WRIT

I. The First Circuit Opinion directly conflicts with the Third, Sixth, Ninth, Tenth and Eleventh Circuits that held that Back Pay is an equitable remedy ;to be decided by the Court.

The Sixth Circuit in Hildebrand v. Board of Trustees of Michigan State University decided that "if the remedy sought is injunctive relief/ or back pay no jury trial attaches. In Moore v Sun Oil Company of Pennsylvania, 636 F2d 154 (6th Cir. 1980) maintained the position that back pay was equitable relief and that the parties were not entitled to a jury trial on that issue.

The Eleventh Circuit in Sullivan v School of Board of Pinellas County 773 f2d 1982, 1187 (11th Cir 1985) held that back pay is an equitable relief in Harkless v Sweency Independent School

District 427 F2d. 319, 323, 324 (5th Cir. 1970) Cer. denied 400 U.S. 991, 91 S. Ct 451, 27 2 Ed. 439 (1971).

Ninth Circuit also held that back pay is an equitable cause of action and accordingly not sufficient to create a right to jury trial. Williams v Owens Illinois, Inc., 665 F2d 918,929 (9th Cir.) Cert. denied 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d. 283 (1982).

The Tenth Circuit also held that back pay is an equitable relief But of Skinner v. Total Pertoleum, Inc. , 859 F2d 1439 (10th Cir. 1988).

Third Circuit took the same position in Laskaris v. Thornburg,733 F2d. 260, 263 (3rd Cir.) Cert. denied 459 U.S. 886, 105 S. Ct. 260, 83 L. Ed. 2d. 196 (1984) and decided that back pay under 42 U.S.C. Sect. 1983 is equitable relief.

Only the Eight Circuit in Letser v. Novack Investment Co., 638 F2d 1137 (8th Cir.) Cert. denied 454 U.S. 1064, 102 S. Ct. 615, 70 L Ed. 2d. 601 (1981) in a Section 1981 case has taken the same path as the First Circuit in placing the back pay issue in the hands of the jury as legal damages.

Brown v. Massachuset decided by this

Honorable Superiority addresses the situation and differentiates between legal damages "which are intended to provide a victim with monetary compensation for an injury to his person, property or reputation and an equitable relief which may include an order providing for the reinstatement of an employee with bak pay. Brown at page 893.

As can be seen Sixth, Eleventh, Ninth, Tenth and Third Circuit have taken the stand that back pay should be decided by the Court and not by the Jury. The reasoning at the First Circuit creates conflicting results on virtually identical issues. The rationale on the Third, Sixth, Ninth, Tenth and Eleven Circuits reflects the just: path. The conflict in clear an irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons the petition for writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 98-2067

NILDA SALDAÑA, ET AL.,

Plaintiffs, Appellants,

v.

RAMON VEGA SOSA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Pérez Jiménez, U.S. District Judge]

Before

Selya, Boudin and Stahl,

Circuit Judges

ANTONIO BAUZA TORRES, on brief for Petitioner; CARLOS LUGO FIOL, Solicitor General, EDDA SERRANO-BLASINI, Deputy Solicitor General; IRENE S. SOROETA-KODESH, Assistant Solicitor General; on brief for Respondent Vega Sosa and Ferrer, ALDARANDO AND LOPEZ BRAS, Eliezer Aldarondo Ortiz, Claudio Aliff Ortiz and Pablo Landrau Pirazzi on brief for respondent López Gerena

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April 15, 1999

SEYLA, Circuit Judge. Plaintiffs, former employees of the Municipality of Humacao, alleged that they were dismissed from non-policymaking positions in the municipal government on account of their political affiliations. See Ruttan v. Republican Party of Illinois, 497 U.S. 62 (1990); Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). After a trial that lasted upwards of three weeks, the district court submitted the case to the jury. In respect to compensatory damages, the court charged as follows:

> If you find that [a] defendant is liable to [a] plaintiff, then you must determine an amount that is fair compensation for all of the plaintiff's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole — that is, to compensate the plaintiff for the damage that the plaintiff has suffered.
>
> You may award compensatory damages only for injuries that the plaintiff proves

> were proximately caused by the defendant's allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. You should not award compensatory damages for speculative injuries but only for those injuries which the plaintiff has actually suffered or that the plaintiff is reasonably likely to suffer in the future.

The jury found the defendants liable and awarded compensatory damages in varying amounts to the several plaintiffs.

The plaintiffs then filed a post-verdict motion requesting equitable relief. The district court ordered some incremental redress (e.g., reinstatement) but refused to award back pay, principally on the ground that back pay was subsumed by the jury's compensatory damage awards. See Saldaña Sanchez v. Vega Sosa, Civ. No. 90-1403 (PG), slip op. At 5 (D.P.R. March 21, 1997) (unpublished). The plaintiffs appeal from the denial of back pay.

The plaintiffs' basic argument is that the trial court "erred in denying back pay to

plaintiffs as the issue of back pay was not placed to the jury as one of the factors to be considered when awarding compensatory damages." Appellants' Brief at 3. We reject this argument for three interrelated reasons.

First: This case is controlled by our decision in Santiago-Negrón v. Castro Dávila, 865 F.2d 431 (1st Cir 1989), in which we held:

> In a § 1983 case based upon an alleged unconstitutional political firing where the issues of liability and compensatory damages will be determined by a jury, back pay shall be considered by the jury as one of the items of compensatory damages.

Id. at 441. We explained that:

> Submission of the issue of back pay to the jury as a factor to be considered in its award of compensatory damages eliminates the inevitable overlap between compensatory damages and back pay. In most cases of an alleged unconstitutional firing, there will be evidence of the employee's pay.

> To expect a jury to ignore this is unrealistic, especially where it may constitute the major item of compensatory damages.

Id. We have followed the same rationale in subsequent cases. See, e.g., Perez-Serrano v. DeLeón-Vélez, 868 F.2d 30, 32-33 (1st Cir. 1989); Cordero v. De Jesús Méndez, 867 F.2d 1, 6 (1st Cir. 1989).

Like Santiago-Negrón, this was a political reprisal case in which a jury trial had been demanded, see Fed. R. Civ. P. 38 (b), and the issues of liability and compensatory damages were therefore to be determined by a jury. In such circumstances, our precedents are squarely on point. Thus, the district court properly followed the teachings of Santiago-Negrón and refused to augment the damage awards with back pay awards.

Second: The plaintiffs contend that Santiago-Negrón and its progeny should not govern here because the lower court's instructions did not explicitly tell the jury that it could consider back pay in calculating the

quantum of compensatory damages.[1] This contention lacks force. There was no such express instruction in Santiago-Negrón itself. See Santiago-Negrón, 865 F.2d at 441. Seen in that perspective, the Santiago-Negrón rule contemplates that, with or without an affirmative instruction, a jury, having heard evidence of lost wages and being left at liberty to consider that evidence, is all too likely to factor those foregone wages into the decisional calculus. See id. at 441-42; see also Cordero, 867 F.2d at 6-7. Here, the plaintiffs concede that the jury heard evidence of their lost wages, and they do not claim that the court instructed the jury to disregard this evidence in computing compensatory damages. Thus, Santiago-Negrón applies.

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[1] Although we assume, favorably to the plaintiffs, that their premise is true, it is by no means clear that the court's charge was as inexplicit as they contend. At one juncture (albeit at a remove from the instruction on compensatory damages, the court did tell the jury:

> Actual damages include any wages or fringe benefits you find plaintiff would have earned in [his/her] employment with defendant if [he/she] had not been discharged . . ., minus the amount of earnings and benefits from other employments received by [such] plaintiff during that time.

Third: This might be a different case, of course, if the plaintiffs had requested that the trial court give and explicit instruction (either one placing back pay squarely within the jury's contemplation, or one removing it from the jury's ken). However, in the meager appellate record that the plaintiffs have produced, there is no sign that they made such a request – and, in their brief, they do not claim to have done so. Even more important, the plaintiffs have not alleged that they seasonably objected to the charge that the trial court in fact gave. Failure to objected to jury instructions at the time and in the manner specified by Fed. R. Civ. P. 51 constitutes a forfeiture. See, e.g., Elliot v. S.D. Warren Co., 134 F. 3d 1, 5-6 (1st Cir. 1998); La Amiga del Pueblo, Inc. v. Robles, 937 F.2d 689, 691-692 (1st Cir. 1991). We see no reason to relieve the instant plaintiffs from the easily foreseeable consequence of such an ommision.

We need go no further. The plaintiffs had a bite of the apple when the judge submitted the question of compensatory damages to the jury. They were not entitled to a second bite after the jury delivered its verdict.

Affirmed.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF PUERTO RICO

NILDA M. SALDAÑA SANCHEZ, ET ALS	*	
Plaintiffs	*	Case No.
v.	*	90-1403 (PG)
RAMON VEGA SOSA, ET ALS	*	
Defendants	*	

OPINION AND ORDER

The matter before the Court is plaintiff's motion requesting remedies in equity (Docket #126). After being granted two extensions of time to file their opposition, defendants have failed to do so. (Docket #s 128, 131).

Plaintiffs are seeking from defendants reinstatement,[1] back pay, interests, costs and attorney's fees.

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[1]When officers sued in their official capacity leave office during the pendency of an action, their successors are automatically substituted under Fed. R. Civ. P. 25(d). María Santiago v. CRUV, 554 F.2d 1210, 1213 (1st Cir. 1977); González Torres v. Toledo, 586 F.2d 858 (1st Cir. 1978).

Reinstatement

The First Circuit has repeatedly held that "[o]ne of the remedies available for a political discharge in violation of first amendment rights is reappointment." Santiago Negrón v. Castro-Dávila, 865 F.2d 431, 437 (1st Cir. 1989); Rosario Torres v. Hernández Colón, 889 F.2d 314, 322-323 (1st Cir. 1989); Hiraldo Cancel v. Aponte, 925 F. 2d 10 (1st Cir. 1991), cert. denied 502 U.S. 1004 (1991). The fact that the municipal employee's appointments are not made following the Puerto Rico personnel laws does not prevent the reinstatement of those employees discharged based on their political affiliation in violation of their First Amendment Rights. Santiago-Negrón v. Castro-Dávila, supra.

As an equitable remedy, the First Circuit has stressed that the flexible application of reinstatement "seems particularly desirable in cases involving important private rights and public institutions" such as those involving political discrimination. Velázquez v. Figueroa-Gómez, 996 F.2d 425, 427 (1st Cir. 1993), cert. denied, 510 U.S. 993 (1993) (citing Rosario-Torres v. Hernández-Colón, 889 F.2d at 320-321).

Although not a presumptive entitlement in a section 1983 case, see Rosario-Torres v.

Hernández-Colón, 889 F.2d at 322-23, the First Circuit has recognized that reinstatement may offer significant deterrent and curative value in appropriate cases. Hiraldo-Cancel v. Aponte, supra. The First Circuit cites from the Eleventh Circuit "[w]hen a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole." Id., 92 F.2d at 13, citing Allen v. Autauga County Bd. Of Educ., 685 F.2d 1302, 1306 (11th Cir. 1982).

Some of the factors to be considered are: (1) the strength of the evidence proving the first amendment violation; (2) whether the discharged employee has found comparable work; (3) the absence of a property right in the position because the employee was hired in violation of local law; and (4) the ineligibility of the employee for the position due to failure to meet established qualifications, which would permit immediate discharge for no reason or any permissible reason. Velázquez v. Figueroa-Gómez, 994 F.2d at 429.

The evidence of political discrimination was "overwhelming." See our Opinion and Order of March 12, 1997. Plaintiffs claim that

José Luis Torres[2] was only able to obtain temporary and transitory work in F.E.M.A., that Joel González and Juan Nieves Santiago worked for short periods of time in constructions, that Sinforiano Castillo, Rafael Delgado-Mestre, Miguel Ocasio, Margarita Poupart, Miguel Ramos Cruz, Zulma Rivera, Angel L. Rodríguez Lazú and Nilda Saldaña have been unable to find work. No mention is made of plaintiffs Hilda Ortiz Ortiz and José Luis Báez Rodríguez, and whether they have found comparable work.[3] Examples of countervailing equities to the third factor, to wit: the absence of a property right in the position because the employees were hired in violation of the Puerto Rico personnel laws, is the testimony of Vega Sosa that a system for the recruitment of personnel was never completed in the Municipality of Humacao and the fact that he left in place some illegally-hired employees who did not participate in the campaign for Mr. Higgins. See Rosario-Torres v. Hernández-

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[2] José LuisTorres does not appear as plaintiff in this case. There are two José L. plaintiffs but their last name is not Torres.

[3] Plaintiffs Julio C. Mojica and Luz M. Ortiz, deceased during the course of this action, were substituted by their legal heirs.

Colón, 889 F.2d at 323 n.10. There is no doubt that plaintiffs possessed the required qualifications for the positions as evidenced by their evaluations. The Court concludes that reinstatement should be granted. Plaintiffs should inform the Court who are requesting reinstatement since not all of them have been described as not having found comparable work.

Back Pay

"[I]n a 1983 case based upon an alled unconstitutional political firing where the issues of liability and compensatory damages will be determined by a jury, back pay shall be considered by the jury as one of the items of compensatory damages." Santiago-Negrón v. Castro-Dávila, 865 F.2d at 441.

The instructions on compensatory damages were as follows:

> If you find that the defendant is liable to the plaintiff, then you must determine an amount that is fair compensation for all of the plaintiff's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make

> the plaintiff whole – that is, to compensate the plaintiff for the damage that the plaintiff has suffered.
>
> You may award compensatory damages only for injuries that the plaintiff proves were proximately caused by the defendant's allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. You should not ward compensatory damages for speculative injuries but only for those injuries which the plaintiff has actually suffered or that the plaintiff is reasonably likely to suffer in the future.

Although the jury was not told to include back pay as an item of compensatory damages, neither was it told not to do so. Similar to the facts in Santiago-Negrón, the evidence was permeated with references to plaintiffs' lost wages. As the instruction shows, the jury was told to determine an amount for all of plaintiffs' damages for the purpose was to make plaintiffs whole. "As a matter of common sense and logic

the jury could reasonable conclude that back pay was one of the items to be factored into the award of compensatory damages." Id. at 442. Therefore, plaintiffs' request for back pay must denied.

Front Pay

Front pay is an equitable relief in section 1983 cases. Haskins v. City of Boaz, 822 F.2d 1014 (11th Cir. 1987); Kerr Solgar v. American Airlines, 1st Cir. Slip Op 96-1117, January 13, 1997 (front pay is an equitable remedy under Title VII), Cf. Wildman v. Lerner Stores Corp., 771 F.2d 605, 616 (1st Cir. 1985) (front pay may be awarded in ADEA suits where reinstatement is impracticable or impossible).

> Where reinstatement is not immediately available as a remedy, either due to the plaintiff's condition, or due to the conditions at the employer that preclude the plaintiff's return (such as hostility of other employees, or the need for an innocent employee to be "bumped" in order to reinstate the plaintiff), front pay is available as an alternative to compensate the

> plaintiff rom the conclusion of trial through the point at which the plaintiff can either return to the employer or obtain comparable employment elsewhere.

Kerr Solgar v. American Airlines, supra, at 5.

At the present time the Court does not know which plaintiffs are seeking reinstatement and whether such reinstatement is practicable or possible in the Municipality of Humacao, especially since defendants have failed to reply to plaintiffs' motion. Therefore, the Court will hold in abeyance its determination as to plaintiffs' request for front pay until such time as the Court is put in a position to determine which plaintiffs are seeking reinstatement and whether reinstatement is available as a remedy.

Cost and Attorney's Fees

Plaintiffs, having prevailed, seek an award of attorney's fees and costs under the Civil Rights Attorney's Fees Award of 1976, 42 U.S.C. § 1988. Under 42 U.S.C. § 1983, reasonable attorney's fees and costs should ordinarily be awarded to prevailing plaintiffs unless especial circumstances make such and award unjust. Hensley v. Eckerhart, 461 U.S.

424, 430 (1983); Witty v. Dukakis, 3 F.3d 517 (1st Cir. 1993). The Court finds no special circumstances making an award unjust in the present case and therefore grants plaintiffs' request for attorney's fees. A verified fee application shall be filed within fifteen (15) days. Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984).

Plaintiffs also seek recovery of costs for expert's fees in the amount of $3,000. In the Civil Rights Act of 1991, Congress amended 42 U.S.C. § 1988 to expressly provide for the award of expert witness fees in action "to enforce a provision of section 1981 or 1981 (a)." See 42 U.S.C. § 1988 (c). The complaint was not brought under section 1981 or 1981 (a); plaintiffs only alleged violations of sections 1983 and 1985. Therefore, since this was not an action proceeding to enforce a provision of section 1981 or 1981 (a), section 1988 does not provide for expert fees against defendants. See, e.g., Johnson v. Northam, 950 F. Supp. 1117, 1127 (N.D. Fla. 1991), citing West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 102 (1991); Stacey v. Stroud, 485 F. Supp. 1135, 1146 (S.D.W.Va. 1993).

Post-Judgment Interest

In civil rights actions alleging discriminatory dismissals plaintiffs are entitled to post-judgment interest pursuant to 28 U.S.C. § 1961. Cordero v. De Jesús-Méndez, 922 F.2d 11 (1st Cir. 1990).

Conclusion

In accordance with the above findings, plaintiffs are entitled to (1) reinstatement to their former positions in the Municipality of Humacao, (2) attorney's fees and (3) post-judgment interest. They are not entitled to back pay nor to the expert fees, and their request for front pay is held in abeyance.

WHEREFORE, based on the foregoing, the court hereby GRANTS in part and DENIES in part plaintiffs' motion requesting equitable costs and attorney's fees within fifteen (15) days from entry of this Opinion and Order, and are FURTHER ORDERED to inform the Court with ten (10) days of the entry of this Opinion and Order the names of the plaintiffs who are seeking reinstatement, and soon thereafter the